
PROPOSED AMENDMENTS
(Legend: *deleted provisions*, **PROPOSED PROVISIONS**)

**REVISED IMPLEMENTING RULES AND REGULATIONS OF R.A. NO. 6957,
"AN ACT AUTHORIZING THE FINANCING, CONSTRUCTION, OPERATION
AND MAINTENANCE OF INFRASTRUCTURE PROJECTS BY THE
PRIVATE SECTOR AND FOR OTHER PURPOSES",
AS AMENDED BY R.A. NO. 7718**

INTRODUCTION

Pursuant to Section 11 of R.A. No. 6957, as amended by R.A. No. 7718, the following Revised Implementing Rules and Regulations are hereby prescribed to carry out the provisions of said Act.

RULE 1 - PRELIMINARY PROVISIONS

SECTION 1.3 - DEFINITION OF TERMS

For purposes of these Implementing Rules and Regulations, the terms and phrases hereunder shall be understood as follows:

- a. **Act** - shall mean Republic Act No. 6957, as amended by Republic Act No. 7718.
- b. **Agency** - Refers to any department, bureau, office, commission, authority or agency of the national government, including Government-Owned or -Controlled Corporations (GOCCs), Government Financial Institutions (GFIs), and State Universities and Colleges (SUCs) authorized by law or their respective charters to contract for or undertake Infrastructure or Development Projects.
- c. **Amortization** - The regular, periodic repayment of principal and payment of interest of a debt for a definite period of time, at the maturity of which the entire indebtedness is paid in full.
- d. **Approving Body** - The entity authorized to approve projects proposed under this Act and in accordance with Sections 2.7 and 2.8 of these Revised IRR.
- e. **Contractual Arrangements** - Refers to any of the following contractual arrangements or schemes, as well as other variations thereof, as may be approved by the President, by which infrastructure and/or development projects may be undertaken pursuant to the provisions of these Revised IRR:
 - i. **Build-and-transfer (BT)** - A contractual arrangement whereby the Project Proponent undertakes the financing and Construction of a given infrastructure or development facility and after its completion turns it over to the Agency or LGU concerned, which shall pay the Project Proponent on an agreed schedule its total investment expended on the project, plus a Reasonable Rate of Return thereon. This arrangement may be employed in the Construction of any Infrastructure or Development Projects, including critical facilities which, for security or strategic reasons, must be operated directly by the Government.
 - ii. **Build-lease-and-transfer (BLT)** - A contractual arrangement whereby a Project Proponent is authorized to finance and construct an infrastructure or development facility and upon its completion turns it over to the Agency/LGU concerned on a lease arrangement for a fixed period, after which ownership of the facility is automatically transferred to the Agency/LGU concerned.
 - iii. **Build-operate-and-transfer (BOT)** - A contractual arrangement whereby the Project

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Proponent undertakes the Construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The Project Proponent operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated and incorporated in the contract to enable the Project Proponent to recover its investment, and operating and maintenance expenses in the project. The Project Proponent transfers the facility to the Agency/LGU concerned at the end of the fixed term that shall not exceed fifty (50) years. This build-operate-and-transfer contractual arrangement shall include a supply-and-operate scheme which is a contractual arrangement whereby the supplier of equipment and machinery for a given infrastructure facility, if the interest of the Government so requires, operates the facility providing in the process technology transfer and training to Filipino nationals.

- iv. **Build-own-and-operate (BOO)** - A contractual arrangement whereby a Project Proponent is authorized to finance, construct, own, operate and maintain an infrastructure or development facility from which the Project Proponent is allowed to recover its total investment, operating and maintenance costs plus a reasonable return thereon by collecting tolls, fees, rentals or other charges from facility users; provided, That all such projects upon recommendation of the Investment Coordination Committee (ICC) of the National Economic and Development Authority (NEDA), shall be approved by the President of the Philippines. Under this project, the proponent who owns the assets of the facility may assign its operation and maintenance to a Facility operator.
- v. **Build-transfer-and-operate (BTO)** - A contractual arrangement whereby the Agency/LGU contracts out the Construction of an infrastructure facility to a private entity such that the Contractor builds the facility on a turnkey basis, assuming cost overruns, delays, and specified performance risks. Once the facility is commissioned satisfactorily, title is transferred to the implementing Agency/LGU. The private entity however operates the facility on behalf of the implementing Agency/LGU under an agreement.
- vi. **Contract-add-and-operate (CAO)** - A contractual arrangement whereby the Project Proponent adds to an existing infrastructure facility which it is renting from the Government and operates the expanded project over an agreed Franchise period. There may or may not be a transfer arrangement with regard to the added facility provided by the Project Proponent.
- vii. **Develop-operate-and-transfer (DOT)** - A contractual arrangement whereby favorable conditions external to a new infrastructure project which is to be built by a Project Proponent are integrated into the arrangement by giving that entity the right to develop adjoining property, and thus, enjoy some of the benefits the investment creates such as higher property or rent values.
- viii. **Rehabilitate-operate-and-transfer (ROT)** - A contractual arrangement whereby an existing facility is turned over to the Project Proponent to refurbish, operate and maintain for a Franchise period, at the expiry of which the legal title to the facility is turned over to the Government. The term is also used to describe the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country.
- ix. **Rehabilitate-own-and-operate (ROO)** - A contractual arrangement whereby an existing facility is turned over to the Project Proponent to refurbish and operate with no time limitation imposed on ownership. As long as the operator is not in violation of its Franchise, it can continue to operate the facility in perpetuity.
- g. **Construction** - Refers to new construction, rehabilitation, improvement, expansion, alteration, and related works and activities including the necessary design, supply, installation, testing and commissioning of equipment, systems, plants, materials, labor and services and related items needed to build or rehabilitate an infrastructure or development facility.

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- h. **Contractor** - Refers to any entity accredited under Philippine laws, or that should be accredited under Philippine laws in accordance with Section 5.4 (a.v) hereof, which may or may not be the Project Proponent and which shall undertake the actual Construction and/or supply of equipment for the project.
- i. **Development Program** - Refers to national, regional or local government plans or programs included in, but not limited to, the Medium-Term Philippine Development Plan (MTPDP), the Regional Development Plans and Local Development Plans.
- j. **Direct Government Guarantee** - Refers to an agreement whereby the Government or any of its Agencies/LGUs guarantees to assume responsibility for the repayment of debt directly incurred by the Project Proponent in implementing the project in case of a loan default.
- k. **Facility Operator** - Refers to a company registered with the Securities and Exchange Commission (SEC), which may or may not be the Project Proponent, and which is responsible for all aspects of operation and maintenance of the infrastructure or development facility, including but not limited to the collection of tolls, fees, rentals or charges from facility users; provided, that in case the facility requires a public utility Franchise, the Facility Operator shall, no later than the commencement of operation of the facility, comply with the nationality and ownership requirements under the Constitution and other applicable laws and jurisprudence.
- l. **Franchise** - Refers to a certificate, permit or other form of authorization required to be obtained by a Facility Operator from a Regulator prior to operating a Public Utility Project.
- m. **Government Undertakings** - Refers to any form of contribution and/or support provided under Section 13.3 of these Revised IRR, which the Government or any of its Agencies/LGUs may extend to a Project Proponent.
- n. **Head of Agency/LGU** - Shall be defined as: (i) the head of the agency or body, for national government agencies (NGAs) and the constitutional commissions or offices, and branches of government; (ii) the Governing Board or its authorized official/managing head/Chief Executive Officer of GOCCs, GFIs, or SUCs; or (iii) the Sanggunian or its authorized official or the local chief executive, for LGUs.
- o. **ICC** - Refers to the Investment Coordination Committee of the National Economic and Development Authority (NEDA) Board.
- p. **Investment Incentives** - Refers to any form of contribution and/or support, which the Government or any of its Agencies/LGUs including GOCCs may extend to the Project Proponent in accordance with Section 13.2 of these Revised IRR.
- q. **IRR** - Shall mean these Revised Implementing Rules and Regulations.
- r. **List of Priority Projects** - Refers to the list of Private Sector Infrastructure or Development Projects approved in accordance with Section 2.3.
- s. **Local Government Units (LGUs)** - Refer to provincial, city, municipal and/or barangay government entities.
- t. **Negotiated Contracts** - Refers to contracts entered into by the Government in cases prescribed under Rule 9.
- u. **PBAC** - Refers to the Pre-qualifications, Bids, and Awards Committee established in accordance with Rule 3 of these Revised IRR.
- v. **Private Sector Infrastructure or Development Projects** - The general description of Infrastructure or Development Projects normally financed, and operated by the public sector but which will now be wholly or partly financed, constructed and operated by the private sector, including but not limited to, power plants, highways, ports, airports, canals, dams,

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hydropower projects, water supply, irrigation, telecommunications, railroad and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, public markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may otherwise be authorized by the appropriate Agency/LGU pursuant to the Act or these Revised IRR. Such projects shall be undertaken through Contractual Arrangements as defined herein, including such other variations as may be approved by the President of the Philippines.

w. **Project Cost** - Refers to the total cost to be expended by the proponent to plan, develop and construct the project to completion stage including but not limited to cost of feasibility studies engineering and design, Construction, equipment, land and right-of-way, taxes imposed on said cost, and development cost.

x. **Project Loan** - Refers to all loans and/or credit facilities extended by financial institutions, multi-lateral lenders, export credit agencies, and all other third party lenders to the project company and/or Project Proponent for the development and/or operation of the project.

Foreign loans/foreign currency loans to be incurred by the project company shall be in accordance with prevailing *Bangko Sentral ng Pilipinas* (BSP) regulations.

y. **Project Proponent** - Refers to the private sector entity which shall have contractual responsibility for the project and which shall have an adequate track record in the concerned industry as well as technical capability and financial base consisting of equity and firm commitments from reputable financial institutions to provide, upon award, sufficient credit lines to cover the total estimated cost of the project to implement the said project.

z. **Public Utility Projects** - Refers to projects or facilities that provide public services as defined under the Public Services Act, as amended, and for which a Franchise is required.

a.a. **Reasonable Rate of Return** - Refers to the rate of return that a Project Proponent shall be entitled to, as determined by the **ICC** taking into account, among others, the prevailing cost of capital (equity and borrowings) in the domestic and international markets, risks being assumed by the Project Proponent and the level of Government Undertakings extended for the project; provided, further, that in the case of Negotiated Contracts, such rate of return shall be determined by the **ICC** prior to **NEGOTIATION AND/OR** call for proposals; provided further, that for Negotiated Contracts for public utilities projects which are monopolies, the rate of return on rate base shall be determined by existing laws, which in no case shall exceed twelve per centum (12%), as provided by the Act.

b.b. **Regulator** - Refers to the agency, body or commission empowered by law to fix the rates of a provider of a particular public service as defined by the Commonwealth Act No. 146, as amended (Public Service Act, as amended) and for which a Franchise is required to operate the same.

c.c. **Unsolicited Proposals** - Refer to project proposals submitted by the private sector, not in response to a formal solicitation or request issued by an Agency/LGU, to undertake Infrastructure or Development Projects which may be entered into by Agency/LGU subject to the requirements/conditions prescribed under Rule 10.

RULE 2 - GENERAL PROVISIONS

SECTION 2.1 - AUTHORIZED CONTRACTING GOVERNMENT AGENCIES/UNITS

The following are authorized to enter into Contractual Arrangements under this Act and these Revised IRR:

a. All concerned departments, bureaus, offices, commissions, authorities, or agencies of the national government, including GOCCs, GFIs, SUCs, and LGUs authorized by law or by their

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respective charters to undertake Infrastructure or Development projects.

SECTION 2.2 - ELIGIBLE TYPES OF PROJECTS

The Construction, rehabilitation, improvement, betterment, expansion, modernization, operation, financing and maintenance of the following types of projects which are normally financed and operated by the public sector which will now be wholly or partly financed, constructed and operated by the private sector, including other infrastructure and development projects as may be authorized by the appropriate agencies, may be proposed under the provisions of the Act and these Revised IRR:

- a. Highways, including expressway, roads, bridges, interchanges, tunnels, and related facilities;
- b. Railways or rail-based projects packaged with commercial development opportunities;
- c. Non-rail based mass transit facilities, navigable inland waterways and related facilities;
- d. Port infrastructures like piers, wharves, quays, storage, handling, ferry services and related facilities;
- e. Airports, air navigation, and related facilities;
- f. Power generation, transmission, sub-transmission, distribution, and related facilities;
- g. Telecommunications, backbone network, terrestrial and satellite facilities and related service facilities;
- h. Information technology (IT) and data base infrastructure, including modernization of IT, geo-spatial resource mapping and cadastral survey for resource accounting and planning;
- i. Irrigation and related facilities;
- j. Water supply, sewerage, drainage, and related facilities;
- k. Education and health infrastructure;
- l. Land reclamation, dredging and other related development facilities;
- m. Industrial and tourism estates or townships, including related infrastructure facilities and utilities;
- n. Government buildings, housing projects;
- o. Markets, slaughterhouses, and related facilities;
- p. Warehouses and post-harvest facilities;
- q. Public fish ports and fishponds, including storage and processing facilities; and
- r. Environmental and solid waste management related facilities such as but not limited to collection equipment, composting plants, landfill and tidal barriers, among others.

SECTION 2.3 - LIST OF PRIORITY PROJECTS

Concerned Agencies/LGUs are tasked to prepare their infrastructure or development programs and to identify specific priority projects that may be financed, constructed, operated and maintained by the private sector through the Contractual Arrangements or schemes authorized under these Revised IRR. **THE LIST OF PRIORITY PROJECTS SHALL BE ENDORSED AND SUBMITTED BY**

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THE HEAD OF AGENCY/LGU to the Approving Body FOR APPROVAL, as specified in Section 2.7.

SECTION 2.4 - PUBLICATION AND NOTICE

All Agencies/LGUs shall provide wide publicity of the List of Priority Projects proposed for implementation under the Contractual Arrangements or schemes as authorized under the Act and these Revised IRR to keep interested/concerned parties informed thereof. For this purpose, all Agencies/LGUs shall cause their respective List of Priority Projects, **AS APPROVED BY THE APPROVING BODY** to be published at least once every six (6) months in a national newspaper of general circulation, and where applicable, international newspapers of general circulation. Said List should also be posted continuously in the website of the concerned Agency/LGU, if available.

SECTION 2.5 - REGISTRATION OF PROJECT PROPONENTS

Project Proponents may register with the Agency/LGU, indicating which projects are of interest to them, and for this purpose, submit their company profiles in the form **AS** prescribed **BY THE AGENCY/LGU**. Duly registered Project Proponents shall be officially notified and furnished by the Agency/LGU a copy of the list of their respective priority projects and corresponding project updates at least once every six (6) months.

SECTION 2.6 - ALLOWABLE MODES OF IMPLEMENTATION

Projects may be implemented through public bidding or direct negotiation. The direct negotiation mode is subject to conditions specified in Rules 9 and 10 hereof.

SECTION 2.7 - APPROVAL OF THE LIST OF PRIORITY PROJECTS

The approval of THE LIST OF PRIORITY PROJECTS proposed under this Act shall be in accordance with the following:

- a. **National Projects** - The LIST OF PRIORITY PROJECTS must be part of the Agency's development programs, and shall be approved as follows:
 - i. THE LIST OF projects costing up to PhP 300 million, shall be submitted to ICC for approval; **AND**
 - ii. THE LIST OF projects costing more than PhP 300 million, shall be submitted to the NEDA Board for approval upon the recommendation of ICC.
- b. **Local Projects** - **THE LIST OF PRIORITY PROJECTS** to be implemented by the LGUs shall be submitted by the concerned LGU for confirmation, as follows:
 - i. to the municipal development council for projects costing up to PhP 20 million;
 - ii. to the provincial development council for those costing above PhP 20 million up to PhP 50 million;
 - iii. to the city development council for those costing up to PhP 50 million;
 - iv. to the regional development council or, in the case of Metro Manila projects, the Regional Development Council for Metropolitan Manila, for those costing above PhP 50 million up to PhP 200 million; and
 - v. to the ICC for those costing above PhP 200 million.

Final approval of THE LIST OF PRIORITY PROJECTS classified under b.i to b.iv of this section is vested on the Local Sanggunians PURSUANT TO APPLICABLE provisionS of the

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Local Government Code.

SECTION 2.8 - DETAILED GUIDELINES FOR THE APPROVAL OF THE LIST OF PRIORITY PROJECTS

The Approving Body shall, from time to time, prescribe or revise detailed guidelines on the process and procedures for the approval of THE LIST OF PRIORITY PROJECTS as well as the requirements to be submitted in support thereof, provided that the same are consistent with the Act and these Revised IRR.

SECTION 2.9 - PRESIDENTIAL APPROVAL, WHEN REQUIRED

Projects undertaken through the BUILD-OWN-AND-OPERATE (BOO) scheme or through Contractual Arrangements or schemes other than those defined under Section 2 OF THE ACT AND SECTION 1.3 (f) of these Revised IRR shall require Presidential approval. For this purpose, the Head of Agency/LGU shall submit the proposed project to the NEDA Board through the ICC, FOLLOWING THE GUIDELINES OF THE ICC, which shall evaluate the proposal and forward its recommendations to the President. However, such projects shall be deemed to have been approved by the President when approved at a NEDA Board meeting presided over by the President.

SECTION 2.10 - DEADLINE FOR APPROVAL OF THE LIST OF PRIORITY PROJECTS

The Approving Body shall act on the LIST OF PRIORITY PROJECTS within thirty (30) **WORKING** days upon satisfactory compliance by the concerned Agency/LGU with the requirements of the Approving Body. Failure of the Approving Body to act on the LIST OF PRIORITY PROJECTS within the specified period shall be deemed an approval thereof and the concerned Agency/LGU may proceed with the PUBLICATION OF THE LIST OF PRIORITY PROJECTS. Such approval, however, shall be valid only for a period of TWENTY-FOUR (24) months from the issuance of the approval unless the invitation to pre-qualify and to bid has been issued; provided, that the Approving Body shall issue a written notice of approval or disapproval upon the written request for extension by the Agency/LGU, which must be filed within TWENTY-FOUR (24) months from the issuance of such approval.

AGENCIES/LGUS MAY SUBMIT A REVISED LIST OF PRIORITY PROJECTS ANNUALLY FOR APPROVAL OF THE APPROVING BODY IF THEY DEEM THAT CHANGES SHOULD BE MADE IN SAID LIST.

RULE 3 - THE BOT PRE-QUALIFICATION, BIDS, AND AWARDS COMMITTEE

SECTION 3.1 - COMPOSITION

The Head of the Agency/LGU shall create a BOT Pre-qualification, Bids and Awards Committee (PBAC) composed of the following:

- a. At least a third ranking regular official of the Agency/LGU - Chairman
- b. A legal officer - Member-Secretary
- c. One (1) technical officer knowledgeable with the technical aspects or requirements of the project, duly designated by the Head of Agency/LGU concerned on a project-to-project basis - Member (provisional)
- d. One (1) technical officer knowledgeable with aspects or requirements of the project from a concerned regulatory body, when applicable, to be invited by the Agency/LGU concerned on a project-to-project basis. - Member (provisional and non-voting)

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- e. An officer knowledgeable in finance - Member
- f. An officer knowledgeable in management/operation of the project - Member
- g. Two (2) representatives from the private sector: one from duly recognized Contractors associations; and the other from either the facility users, or duly recognized accounting associations. - Observers (non-voting)
- h. A representative from the Commission on Audit - Observer (non-voting)

- l. One (1) representative from the local DILG office, for LGU projects - Observer (non-voting)

Observers will be notified at least two (2) calendar days before the following stages: pre-bid conference, opening of bids, evaluation of bids, contract award, and special meetings of the PBAC. The absence of observers will not nullify the PBAC proceedings, provided that they have been duly invited in writing.

SECTION 3.2 - RESPONSIBILITY OF THE PBAC

The PBAC herein created shall be responsible for all aspects of the pre-bidding and bidding process in the case of solicited proposals, and for the comparative bidding process (otherwise known as the "Swiss Challenge"), in the case of Unsolicited Proposals, including, among others, the preparation of the bidding/tender documents, publication of the invitation to pre-qualify and bid, pre-qualification of prospective bidders, conduct of pre-bid conferences and issuance of supplemental notices, interpretation of the rules regarding the bidding, the conduct of bidding, evaluation of bids, resolution of disputes between bidders, and recommendation for the acceptance of the bid and/or for the award of the project.

SECTION 3.3 - QUORUM

A quorum of the PBAC shall be composed of a simple majority of all voting members of the Committee. The Chairman shall vote only in case of a tie.

RULE 4 - BID/TENDER DOCUMENTS

SECTION 4.1 - BID/TENDER DOCUMENTS

The Agency/LGU concerned shall prepare the bid/tender documents, which shall include the following:

- a. "Instructions to Bidders";
- b. "Minimum Design, Performance Standards/Specifications, and Economic Parameters" such as discount rate, inflation factor and foreign exchange rate, where applicable, among others;
- c. "Draft Contract" reflecting the contractual arrangement under which the project shall be undertaken, and the respective undertakings of the contracting parties, among others;
- d. "Bid Form" reflecting the required information to properly evaluate the bid proposal;
- e. forms of bid and performance securities;
- f. current applicable rules and regulations of the BSP; and
- g. other documents as may be deemed necessary by the Agency/LGU concerned.

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SECTION 4.2 - INSTRUCTIONS TO BIDDERS

The instructions to bidders, which establish the rules of the bidding, shall be clear, comprehensive and fair to all bidders and shall, as far as necessary and practicable, include the following information:

- a. General description and objectives of the project, including a statement that the project shall be proposed under Republic Act No. 6957, as amended by Republic Act No. 7718 and these Revised IRR;
- b. Contractual arrangement under which the project shall be undertaken;
- c. Bid submission procedures and requirements, which shall include information on the manner of bid submission, the number of copies of bid proposal to be submitted, where the bids are to be submitted, the deadline for the submission of bids, permissible mode of transmission of bid proposals, etc.;
- d. Investment Incentives and Government Undertakings under Rule 13;
- e. Bid security and bid security validity period;
- f. Milestones;
- g. Method and criteria for the evaluation of the technical component of the bids;
- h. Parameters and criteria for evaluation of financial component of the bids;

Any one or more of the following criteria may be used in the evaluation of the financial component of the bid for determining the most advantageous bid for the Government:

- i. Lowest proposed toll, fee, rental or charge at the start of project operation, if a pre-agreed parametric tariff adjustment formula is prescribed in the bid document;
 - ii. Lowest present value of proposed tolls, fees, rentals and other charges for the period covered by the contract;
 - iii. Lowest present value of government subsidy to be provided for the period covered by the contract;
 - iv. Highest present value of proposed payments to Government, such as: concession fees, lease/rental payments, fixed/guaranteed payments, and/or variable payments/percentage shares of revenue for the period covered by the contract; or
 - v. Any other appropriate financial bid parameter as may be **DEEMED NECESSARY BY THE AGENCY/LGU.**
- i. Minimum amount of equity as **MAY BE** prescribed **BY THE AGENCY/LGU.**
 - j. Formula and appropriate indices to be used in the adjustments of tolls/fees/rentals/charges, when applicable. Said formula shall take into account the reasonableness of the same to users of the project/facility under bidding;
 - k. Requirements of concerned regulatory bodies, such as, but not limited to: the Department of Environment and Natural Resources (DENR), for the issuance of an Environmental Compliance Certificate (ECC); National Water Resources Board (NWRB), for the issuance of the Water Permit; the PCAB, for the registration requirements of Contractors; and, the Toll Regulatory Board (TRB), for the review of toll rates and adjustment formula for Negotiated Contracts.

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- l. Current rules and regulations of the BSP;
- m. Revenue sharing arrangements, if any;
- n. Expected commissioning date; and
- o. Nationality and ownership requirements as, required by law.

SECTION 4.3 - MINIMUM DESIGNS, PERFORMANCE STANDARDS/SPECIFICATIONS AND ECONOMIC PARAMETERS

Minimum design and performance standards/specifications, including appropriate environmental standards as prescribed by the DENR, shall be clearly defined and shall refer more to the desired quantity and quality of the outputs of the facility and should state that non-conformity with any of these minimum requirements shall render the bids as non-responsive. Likewise, for the purpose of evaluating bids, the following economic parameters, among others, shall be prescribed:

- a. Discount rate, foreign exchange rate and inflation factor.
- b. Maximum period of project Construction.
- c. Fixed term for project operation and collection of the proposed tolls/fees/rentals/charges, if applicable.
- d. Formula and price indices to be used in the adjustments of tolls/fees/rentals/charges, if applicable.
- e. Minimum period of repayment, if applicable.
- f. Revenue Share of the Implementing Agency/LGU, if applicable.
- g. Minimum amount of equity ; and
- h. Current rules and regulations of the BSP.

SECTION 4.4 - DRAFT CONTRACT

THE AGENCY/LGU SHALL BE RESPONSIBLE IN ENSURING THE CONSISTENCY OF THE DRAFT CONTRACT WITH THE PARAMETERS, INCLUDING TERMS AND CONDITIONS ON THE BOT PROJECTS.

The draft contract should clearly define the basic and legal relationship between the parties and their rights and responsibilities including the specific Government Undertakings to be provided by the Agency/LGU relative to the project. The draft contract shall have the following mandatory terms or conditions:

- a. specific contractual arrangement, term, and scope of work;
- b. project technical specifications and system features;
- c. implementation milestones including those for securing other approvals, project completion date;
- d. cost recovery scheme via proposed tolls, fees, rentals and charges, as the case may be;
- e. liquidated damages as contemplated under Section 12.14;
- f. performance and warranty bonds contemplated under Sections 12.8 and 12.9;
- g. minimum insurance coverage as follows: Contractors' all risk, motor vehicle, workmen's

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compensation, and third party liability for the project including comprehensive general liability insurance;

- h. acceptance tests and procedures;
- i. warranty period and procedures (after transfer);
- j. grounds for and effects of contract termination including modes for settling disputes;
- k. the manner and procedures for the resolution of warranty against corruption, and
- l. compliance with all other applicable laws, rules, and regulations.

RULE 5 - QUALIFICATION OF BIDDERS

SECTION 5.1 - WHO MAY PARTICIPATE

Any individual, partnership, corporation or firm, whether local or foreign, including joint venture or consortia of local, foreign or local and foreign firms, subject to the limits herein set, may participate or apply for pre- or simultaneous qualification for projects covered under the provisions of the Act and these Revised IRR.

SECTION 5.2 - PUBLICATION OF INVITATION TO PRE-QUALIFY AND BID

THE PUBLICATION OF INVITATION TO PRE-QUALIFY AND BID FOR A PARTICULAR PROJECT SHALL NOT BE MADE UNLESS THE HEAD OF THE AGENCY/LGU HAS APPROVED THE BID DOCUMENTS AND DRAFT CONTRACT AS PRESCRIBED UNDER RULE 4 OF THESE REVISED IRR.

The Head of the Agency/LGU concerned shall, after obtaining approval for the **LIST OF PRIORITY PROJECTS**, forthwith cause to be published, once every week for three (3) consecutive weeks, in at least two (2) newspapers of general circulation and in at least one (1) local newspaper of general circulation in the region, province, city or municipality in which the projects are to be implemented, a notice inviting all prospective infrastructure or development Project Proponents to pre-qualify and bid for the projects so approved. Said invitation should also be posted continuously in the website of the Agency/LGU concerned, if available, during the period stated above. For projects costing at least US\$ 10 million, the invitation may also be published in at least one (1) international publication. Likewise, the Agency/LGU concerned shall issue official notification of the same to Project Proponents registered with them.

The published Invitation to Pre-qualify and Bid shall contain information, among others, whether the Contractor to be employed to undertake the Construction works needs to be pre-identified for pre-qualification purposes or not.

SECTION 5.3 - PERIOD TO PREPARE PRE-QUALIFICATION DOCUMENTS

The Agency/LGU concerned shall allow prospective bidders at least **FIFTEEN (15) WORKING** days from the last date of publication of the Invitation to Pre-qualify and Bid to prepare their respective pre-qualification documents. For projects costing at least PhP 300 million, the period of preparation shall at least be **THIRTY (30) WORKING** days from the last date of publication of the Invitation to Pre-qualify and Bid. In any event, the deadline for submission of pre-qualification statements shall be indicated in the published Invitation to Pre-qualify and Bid.

SECTION 5.4 - PRE-QUALIFICATION REQUIREMENTS

IN FORMULATING THE PRE-QUALIFICATION REQUIREMENTS, THE AGENCY/LGU SHALL ENSURE THAT SAID REQUIREMENTS ARE CONSISTENT WITH APPLICABLE LAWS, RULES AND REGULATIONS.

To pre-qualify, a prospective Project Proponent must comply with the following requirements:

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a. Legal Requirements

- i. For projects to be implemented under the BOT scheme whose operations require a public utility Franchise, the prospective Project Proponent and the Facility Operator must be Filipinos or, if corporations, must be duly registered with the Securities and Exchange Commission (SEC) and owned up to at least sixty percent (60%) by Filipinos. For projects other than these, the prospective Project Proponent shall comply with the nationality and ownership requirements under the Constitution and other applicable laws
- ii. For projects to be implemented through a scheme other than the BOT and requiring a public utility Franchise, the Facility Operator must be a Filipino or, if a corporation, must be duly registered with the Securities and Exchange Commission (SEC) and owned up to at least sixty percent (60%) by Filipinos.

Consistent with existing laws, the Project Proponent may be the operator but it may be allowed to enter into a management contract with another entity, who may be 100% foreign owned, for the day to day operation of the facility, provided that the Project Proponent will assume all attendant liabilities of the operator.

- iii. In case the prospective Project Proponent is a joint venture or consortium, the members or participants thereof shall already be disclosed during the pre-qualification stage and shall undergo pre-qualification. Further, the members or participants thereof shall execute an undertaking in favor of the Agency/LGU that if awarded the contract, they shall bind themselves to be jointly and severally liable for the obligations of the Project Proponent under the contract.

However, if members of the joint venture or consortium organize themselves as a corporation registered under Philippine laws, such corporation shall execute such an undertaking binding itself to be liable for the obligations of the Project Proponent under the contract, which shall substitute or be in lieu of the undertaking submitted by the members or participants of the joint venture or consortium.

- iv. For projects to be operated by the Project Proponent itself or owned by the Project Proponent but operated through a Facility Operator where operation of the facility does not require a public utility Franchise, the Project Proponent or the Facility Operator may be Filipino or foreign-owned.
- v. For purposes of pre-qualification, the Contractor proposed to be engaged by the Project Proponent to undertake the Construction of the project must be duly licensed and accredited by the PCAB, in the case of a Filipino Contractor, or by an equivalent accreditation institution in the Contractor's country of origin, in the case of a foreign Contractor. Once the Project Proponent is awarded the project, such foreign Contractor must secure a license and accreditation from the PCAB.

b. Experience or Track Record - The prospective Project Proponent must possess adequate experience in terms of the following:

- i. Firm Experience - By itself or through the member-firms in case of a joint venture/consortium or through a Contractor(s) which the prospective Project Proponent may have engaged for the project, the prospective Project Proponent and/or its Contractor(s) must have successfully undertaken a project(s) similar or related to the subject infrastructure/development project to be bid. The individual firms and/or their Contractor(s) may individually specialize on any or several phases of the project(s). A joint venture/consortium proponent shall be evaluated based on the individual or collective experience of the member-firms of the joint venture/consortium and of the Contractor(s) that it has engaged for the project.

For purposes of the above, joint ventures/consortia shall submit as part of their pre-qualification statement a business plan which shall, among others, identify their

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members and their Contractor(s), if the experience of their Contractor(s) are necessary for the determination of the capacity of the joint venture/consortium to undertake the project and the description of the respective roles said members and Contractors, if necessary, shall play or undertake in the project. If undecided on a specific Contractor, the prospective Project Proponent may submit a short list of Contractors from among which it will select the final Contractor. Short listed Contractors are required to submit a statement indicating willingness to participate in the project and capacity to undertake the requirements of the project. The business plan shall disclose which of the members of the joint venture/consortium shall be the lead member the financing arm, and/or Facility Operator(s), and the Contractor(s) if required to be pre-identified as prescribed in the published Invitation to Pre-qualify and Bid or if the qualifications/experience of their Contractor(s) are necessary for the determination of the capacity of the joint venture/consortium to undertake the project.

- ii. Key Personnel Experience - The key personnel of the prospective Project Proponent and/or its Contractor(s) must have sufficient experience in the relevant aspect of schemes similar or related to the subject project, as specified by the Agency/LGU.
- c. Financial Capability - The prospective Project Proponent must have adequate capability to sustain the financing requirements for the detailed engineering design, Construction and/or operation and maintenance phases of the project, as the case may be.

The Agency/LGU concerned shall determine on a project-to-project basis, and before pre-qualification, the minimum amount of equity needed. In addition, the Agency/LGU will inform the proponents of the minimum debt-equity ratio required by the BSP for projects to be financed by foreign loans.

For purposes of pre-qualification, this capability shall be measured in terms of proof of the ability of the prospective Project Proponent and/or the consortium to provide:

i. Equity

- (a) a minimum amount of equity to the project measured in terms of the net worth of the company, or in the case of joint ventures or consortia, the combined net worth of members, or
- (b) a set-aside deposit equivalent to the minimum equity required

ii. Debt

A letter testimonial from a domestic universal/commercial bank or an international bank with a subsidiary/branch in the Philippines or any international bank recognized by the BSP attesting that the prospective Project Proponent and/or members of the consortium are banking with them, and that they are in good financial standing and/or are qualified to obtain credit accommodations from such banks to finance the project.

The Agency/LGU, through its PBAC, shall complete the evaluation of the pre-qualification documents of the prospective Project Proponents within thirty (30) calendar days.

SECTION 5.5 - PRE-QUALIFIED AND DISQUALIFIED PROPONENTS

The Agency/LGU, through its PBAC, shall, within a period of thirty (30) calendar days after the deadline set for the submission of the pre-qualification documents, determine which among prospective proponents are "pre-qualified" or "disqualified". Accordingly, the PBAC shall duly inform the prospective Project Proponents who have been pre-qualified within seven (7) calendar days after approval thereof. Disqualified proponents shall likewise be informed stating therein the grounds for their disqualification within the same period. Those disqualified may appeal the disqualification within **SEVEN (7)** working days from receipt of the notice of disqualification to the Head of Agency in the case of national projects, or the Head of the DILG unit concerned or his authorized representative, in the case of local projects.

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The bidding process will be suspended while the appeal is being evaluated. The Head of Agency or Head of the DILG unit concerned or his authorized representative, as the case may be, shall act on the appeal within **THIRTY (30)** working days from receipt of the appeal and upon filing of a non-refundable appeal fee in an amount equivalent to no less than **ONE-TENTH** of one percent (0. **1%**) of the Project Cost. The decision of the Head of Agency or Head of the DILG unit concerned or his authorized representative on the appeal shall be final and immediately executory.

SECTION 5.6 - ISSUANCE OF TENDER DOCUMENTS

The Agency/LGU concerned shall make available the related bid documents to all pre-qualified bidders as soon as practicable to provide respective bidders ample time to examine the same and to prepare their respective bids prior to the date of opening of bids.

SECTION 5.7 - SIMULTANEOUS QUALIFICATION

In the exigency of service, the Agency/LGU Head may opt to do a simultaneous qualification instead of a pre-qualification of proponents. In case of simultaneous qualification, the publication of the invitation, following the requirements in Section 5.2, shall be for the submission of qualification requirements and bid proposals. The bidders shall be asked to submit their proposal in three envelopes; the first envelope - the qualification documents corresponding to the requirements so stated in Section 5.4 herein; the second envelope - the technical proposal; and the third envelope - the financial proposal. The requirements for bid submission are covered under Rule 7 of these Revised IRR. The period for the preparation of the qualification documents shall be subsumed under the time allotted for bid preparation.

SECTION 5.8 - ACCEPTANCE OF CRITERIA AND WAIVER OF RIGHTS TO ENJOIN PROJECT

All prospective bidders shall be required to submit, as part of their qualification documents, a statement stipulating that the bidder (i) has accepted the qualification criteria established by the PBAC of the Agency/LGU concerned, and (ii) waives any right it may have to seek and obtain a writ of injunction or prohibition or restraining order against the concerned Agency/LGU or its PBAC to prevent or restrain the qualification process or any proceedings related thereto, the holding of a bidding or any proceedings related thereto, the negotiation of and award of the contract to a successful bidder, and the carrying out of the awarded contract. Such waiver shall, however, be without prejudice to the right of a disqualified or losing bidder to question the lawfulness of its disqualification or the rejection of its bid by appropriate administrative or judicial processes not involving the issuance of a writ of injunction or prohibition or restraining order.

RULE 6 - SUPPLEMENTAL NOTICES AND PRE-BID CONFERENCES

SECTION 6.1 - RESPONSIBILITY OF BIDDER

The prospective bidder shall be solely responsible for having taken all the necessary steps to carefully examine and **TO BE** acquaint**ED** with the requirements and terms and conditions of the bidding documents with respect to the cost, duration, and execution/operation of the project as it affects the preparation and submission of his bid. The Agency/LGU concerned shall not assume any responsibility regarding erroneous interpretations or conclusions by the prospective bidder out of data furnished or indicated in the bidding documents.

SECTION 6.2 - SUPPLEMENTAL NOTICES

If a bidder is in doubt as to the meaning of any data or requirements or any part of the bidding documents, written request may be submitted to the Agency/LGU concerned for an interpretation of the same, allowing sufficient time for the concerned Agency/LGU to reply before the submission of his/her bid. Any substantive interpretation given by the concerned Agency/LGU shall be issued in the form of a Supplemental Notice, and furnished to all prospective bidders. The Agency/LGU concerned may also issue Supplemental Notices to all prospective bidders at any time for purposes of clarifying any provisions of the bidding documents provided that the same is issued within a

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reasonable period to allow all bidders to consider the same in the preparation of their bids. Receipt of all Supplemental Notices shall be duly acknowledged by each bidder prior to the submission of his bid and shall be so indicated in the bid.

SECTION 6.3 - PRE-BID CONFERENCE

For projects costing less than PhP 300 million, a pre-bid conference shall also be conducted by the concerned Agency/LGU at least thirty (30) calendar days before the deadline for the submission of bids to clarify any provisions, requirements and/or terms and conditions of the bidding documents and/or any other matter that the prospective bidders may raise. For projects costing PhP 300 million and above, the pre-bid conference shall be conducted **FORTY-FIVE (45)** to **NINETY (90)** calendar days before the submission of bids.

Nothing stated at the pre-bid conference shall modify any provisions or terms and conditions of the bidding documents unless such is made as a written amendment thereto by the concerned Agency/LGU. Any amendments shall be issued by the Agency/LGU concerned to all bidders within a reasonable time to allow them to consider the same in the preparation of their bids and shall be duly acknowledged by each bidder prior to the submission of his bid and shall be so indicated in his bid. A summary of the pre-bid conference proceedings shall also be issued to all prospective bidders by the Agency/LGU concerned. Attendance to the pre-bid conference by prospective bidders shall not be mandatory.

RULE 7 - SUBMISSION, RECEIPT AND OPENING OF BIDS

SECTION 7.1 - REQUIREMENTS FOR BID SUBMISSION

Bidders shall be required to submit their bids on or before the deadline stipulated in the "Instructions to Bidders". For pre-qualified bidders, their bids shall be submitted in two (2) separate sealed envelopes, the first being the technical proposal and the second the financial proposal. In case of simultaneous qualification, three (3) envelopes shall be submitted. The first envelope shall be the qualification requirements, the second the technical proposal and the third the financial proposal. All envelopes shall bear the name of the bidder and project to be bid out in capital letters and addressed to the PBAC of the concerned Agency/LGU. They shall be marked "Do Not Open Before (date and time of opening of bids)". The envelopes shall be appropriately labeled as Qualification Requirements, Technical Proposal and Financial Proposal.

- a. The "Qualification Requirements" shall contain requirements as stated in Section 5.4
- b. The "Technical Proposal" shall contain the following:
 - i. Compliance statements with regard to the contractual arrangement and term and scope of work, project technical specifications, system features, implementation milestones including project completion date, acceptance tests and procedures, warranty period and procedures (after transfer), and other technical parameters as stated in the tender documents.
 - ii. Operational feasibility of the project, which shall indicate the proposed organization, methods and procedures for the operation and maintenance of the project under bidding;
 - iii. Technical soundness/preliminary engineering design, including proposed project timeline;
 - iv. Preliminary environmental assessment, which shall indicate the probable adverse effects of the project on the environment and the corresponding mitigating measures to be adopted;
 - v. Project Cost;
 - vi. Bid security in the form of cash, certified check, manager's check, letter of credit, or

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bank draft/guarantee issued by a reputable local/foreign bank, or a surety bond callable on demand issued by the Government Service Insurance System (GSIS) or an entity duly registered and recognized by the Office of the Insurance Commissioner and acceptable to the Agency/LGU, or any combination thereof payable to the Agency/LGU concerned based on the total Project Cost (**AS ESTIMATED BY THE AGENCY/LGU**) in accordance with the following schedules:

PROJECT COST <i>(as estimated by the Agency/LGU o)</i>	<u>REQUIRED BID SECURITY</u>
less than PhP 5.0 billion	2.0% of the Project Cost
less than PhP 5.0 billion to less than PhP 10.0 billion	1.5% of the Project Cost or PhP 100 million, whichever is higher
PhP 10.0 billion and more	1.0% of the Project Cost or PhP 150 million, whichever is higher

In case the bid security is issued by an international bank, said security has to be confirmed and validated by its local branch in the Philippines or by a bank that is duly registered and authorized by the BSP.

The posting of the bid security is for the purpose of guaranteeing that the proposed contract awardee shall enter into contract with the concerned Agency within the time prescribed therefor.

Bids and bid securities shall be valid for a period to be prescribed by the Agency/LGU concerned in the bidding documents but in no case beyond one hundred and eighty (180) calendar days from the date of opening of bids, subject to Section 11.6. The actual amount of bid security to be posted by the bidders will be fixed by the concerned Agency/LGU prior to bidding. Said actual amount shall not be less than the amount prescribed in the above schedule.

- vii. Other documents as may be required by the concerned Agency/LGU to support the bidder's technical proposal.
- c. The "Financial Proposal" shall contain the following, as the case may be:
 - i. Compliance statements with regard to the financial parameters stated in the tender documents, which may include those on liquidated damages as contemplated under Section 12.1 **4**, performance and warranty bonds contemplated under Sections 12. **8** and 12. **9**, insurance cover for the project including comprehensive general liability insurance, acceptance tests and procedures, and warranty period and procedures (after transfer);
 - ii. Proposed Project Cost, operation and maintenance cost, project financing scheme including the amount of equity to be infused and debt to be obtained for the project, sources of financing, and all other related costs; and
 - iii. Financial bid corresponding to the parameters set by the Agency/LGU in accordance with Section 4.2 (h).

SECTION 7.2 - SUBMISSION OF LATE BIDS

Bids submitted after the deadline for submission prescribed in the "Instructions to Bidders" shall be considered late and shall be returned unopened.

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SECTION 7.3 - OPENING OF THE ENVELOPE FOR QUALIFICATION OF BIDDER

At the date and time stipulated in the "Instructions to Bidders", the PBAC shall open the envelope and ascertain whether the same is complete in terms of the information required under Section 5.4. Such information shall be recorded at the time, including the names and addresses of required witnesses. All bidders or their representatives present at the opening of the first envelopes shall sign a register of the opening of the qualification envelope.

SECTION 7.4 - EVALUATION OF QUALIFICATION REQUIREMENTS

The qualification documents will first be evaluated prior to the opening of the technical proposal. The Agency/LGU shall inform bidders whether they are qualified or disqualified, and for the latter, the reasons for disqualification, within fifteen (15) calendar days. Only qualified bidders shall be allowed to participate in the bid evaluation. Disqualified bidders shall be informed of the grounds of disqualification and their technical and financial proposals returned unopened.

SECTION 7.5 - REJECTION OF BIDS

Incomplete information on any of the envelopes and/or non-compliance with the bid security requirements prescribed in Section 7.1 (b) shall be grounds for automatic rejection of bids.

SECTION 7.6 - OPENING OF THE ENVELOPE FOR THE TECHNICAL PROPOSAL

At the date and time of bid opening, as stipulated in the "Instructions to Bidders", the PBAC shall open only the technical proposal and ascertain whether the same is complete in terms of the data/information required under Section 7.1 (b) above and whether the same is accompanied by the required bid security in the prescribed form, amount and period of validity. Such information shall be recorded at the time, including the names and addresses of required witnesses. All bidders or their representatives present at the opening of the first envelopes shall sign a register of the bid opening.

SECTION 7.7 - OPENING OF THE ENVELOPE FOR THE FINANCIAL PROPOSAL

Only those bidders whose technical proposal passed the evaluation criteria as prescribed under Section 8.1 hereof shall have their financial proposal opened for further evaluation. Those who failed the evaluation of the technical proposal shall not be considered further, and the PBAC shall return their financial proposals unopened together with the reasons for their disqualification from the bidding.

Once the bidders who have qualified for the evaluation of the financial proposal have been determined, the PBAC shall notify said bidders of the date, time and place of the opening of the envelopes for the financial proposal. The opening thereof shall follow the same procedures prescribed for the opening of the previous envelopes.

SECTION 7.8 - WITHDRAWAL AND/OR MODIFICATION OF BIDS

Withdrawal and/or modification of bids may be allowed upon written notice by the bidder concerned to the Agency/LGU prior to the time and date set for the opening of bids (opening of first envelopes) as specified in the "Instructions to Bidders". No bids shall be modified or withdrawn after the time prescribed to open bids. Bid modifications received after said period shall be considered late and will be returned unopened. Withdrawal of bids after the bid opening date shall cause the forfeiture of the bidder's bid security.

RULE 8 - EVALUATION OF BIDS

SECTION 8.1 - THE FIRST ENVELOPE EVALUATION

The evaluation of bids shall be undertaken in two (2) stages, in accordance with the procedures described below.

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The first envelope evaluation shall involve the assessment of the technical, operational, environmental, and financing viability of the proposal as contained in the bidders' first envelopes vis-à-vis the prescribed requirements and criteria/minimum standards and basic parameters prescribed in the bidding documents. Only those bids that have been determined to have positively passed the first stage of evaluation shall be qualified and considered for the second stage of evaluation.

The Agency/LGU concerned shall evaluate the technical proposals of the bidder in accordance with the following criteria:

- a. Technical soundness (preliminary engineering design) - The basic engineering design of the project should conform to the minimum design and performance standards and specifications set by the Agency/LGU concerned as prescribed in the bidding documents. The engineering surveys, plans and estimates should be undertaken within +/- 20% of the final quantities. The Construction methods and schedules should also be presented and shown to be feasible or "doable".
- b. Operational feasibility - The proposed organization, methods, and procedures for operating and maintaining the completed facility must be well defined, should conform to the prescribed performance standards, and should be shown to be workable. Where feasible, it should provide for the transfer of technology used in every phase of the project.
- c. Environmental Standards - The proposed design and the technology of the project to be used must be in accordance with the environmental standards set forth by the Department of Environment and Natural Resources (DENR), as indicated in the bid documents. Any adverse effects on the environment as a consequence of the project as proposed by the prospective Project Proponent must be properly identified, including the corresponding corrective/mitigating measures to be adopted.
- d. Project Financing - The proposed financing plan should positively show that the same could adequately meet the Construction cost as well as the operating and maintenance costs requirements of the project. The Agency/LGU concerned shall assess the financing proposals of the bidders if the same matches and adequately meets the cost requirements of the project under bidding.
- e. Enhancements - Other terms which the prospective Project Proponent may offer to the Government to make the proposals more attractive, such as, but not limited to provisions allowing the Government to share in revenues and less government guarantees or reduction in the level of Government Undertakings or support.

The PBAC of the Agency/LGU concerned shall complete the evaluation of the technical proposal within thirty (30) calendar days from the date the bids are opened.

SECTION 8.2 - THE SECOND ENVELOPE EVALUATION

The second envelope evaluation shall involve the assessment and comparison of the financial proposals of the bidders, based on the parameters stated in Section 4.2 (h). The second stage evaluation shall be completed by the PBAC of the concerned Agency/LGU within fifteen (15) calendar days from the date the first stage evaluation shall have been completed.

In the case of BT and BLT schemes, a Filipino Project Proponent who submits an equally advantageous bid with exactly the same price and technical specifications as that of a foreign Project Proponent shall be given preference.

SECTION 8.3 - RIGHT TO REJECT ALL BIDS

The Agency/LGU concerned reserves the right to reject any or all bids, waive any minor defects therein and accept the offer it deems most advantageous to the Government.

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RULE 9 - NEGOTIATED CONTRACT

SECTION 9.1 - DIRECT NEGOTIATION

Direct negotiation shall be resorted to when there is only one complying bidder left as defined hereunder:

- a. If, after advertisement, only one prospective Project Proponent applies for pre-qualification and it meets the pre-qualification requirements, after which, it is required to submit a bid/proposal which is subsequently found by the Agency/LGU to be complying;
- b. If, after advertisement, more than one prospective Project Proponent applied for pre-qualification but only one meets the pre-qualification requirements, after which it submits a bid proposal that is found by the Agency/LGU to be complying;
- c. If, after pre-qualification of more than one prospective Project Proponent, only one submits a bid which is found by the Agency/LGU to be complying;
- d. If, after pre-qualification, more than one prospective Project Proponent submit bids but only one is found by the Agency/LGU to be complying;

In such events, however, any disqualified bidder may appeal the disqualification of the concerned Agency/LGU to the Head of Agency, in case of national projects, or to the Head of the DILG unit concerned or his authorized representative, in case of local projects, within fifteen (15) working days from receipt of the notice of disqualification. The Head of Agency or the Head of the DILG unit concerned or his authorized representative shall act on the appeal within forty-five (45) working days from receipt thereof. The decision of the Head of Agency or the Head of the DILG unit concerned or his authorized representative shall be final and immediately executory.

SECTION 9.2 - UNSOLICITED PROPOSALS

Unsolicited Proposals may be accepted by an Agency/LGU on a negotiated basis, subject to the conditions provided under Rule 10.

SECTION 9.3 - CONDITIONS FOR NEGOTIATED PROJECTS

In addition to the above requisites for negotiated projects, the **ICC SHALL DETERMINE** the Reasonable Rate of Return prior to the negotiation in the case of solicited proposals as referred to under Section 9.1 of these Revised IRR. The scope of negotiation, in the case of solicited proposals referred to under Section 9.1 of these Revised IRR, shall be limited to the financial proposal of the proponent and compliance with the **ICC-DETERMINED** Reasonable Rate of Return.

SECTION 9.4 - FINANCIAL AND TECHNICAL EVALUATION OF NEGOTIATED CONTRACTS

In so far as applicable, the same rules provided for the evaluation of the technical and financial aspects of bid proposals shall be applied in the evaluation of Negotiated Contracts authorized in the Act and these Revised IRR.

RULE 10 - UNSOLICITED PROPOSALS

SECTION 10.1 - REQUISITES FOR UNSOLICITED PROPOSALS

Any Agency/LGU may accept Unsolicited Proposals on a negotiated basis provided that all the following conditions are met:

- a. the project involves a new concept or technology and/or is not part of the List of Priority Projects;

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- b. no Direct Government Guarantee, subsidy or equity is required; and
- c. the Agency/LGU concerned has invited by publication, for three (3) consecutive weeks, in a newspaper of general circulation, comparative or competitive proposals and no other proposal is received for a period of sixty (60) working days.

If no comparative or competitive proposal or no complying bid is received by the Agency/LGU, the original proponent shall immediately be awarded the contract. In the event that a comparative proponent submits a price proposal better than that submitted by the original proponent, the latter shall have the right to match such price proposal within thirty (30) working days from receipt of a notification from the Agency/LGU of the result of the comparative or competitive bid. Should the original proponent fail to match the price proposal of the comparative proponent within the specified period, the contract shall be awarded to the comparative proponent. On the other hand, if the original proponent matches the price proposal of the comparative proponent within the specified period, the project shall immediately be awarded to the original proponent.

SECTION 10.2 - NEW TECHNOLOGY

The Project Proponent proposing a project involving a new concept or technology shall incorporate in its proposal information regarding said new concept or technology which it should have directly, or through any of its key members, successfully implemented at a scale similar to the proposed project. The information disclosed must be in sufficient detail so as to allow the Agency/LGU to properly evaluate the new concept or technology. Additionally, the new technology must possess at least one of the following attributes:

- a. A recognized process, design, methodology or engineering concept which has demonstrated its ability to significantly reduce implementation of Construction costs, accelerate project execution, improve safety, enhance project performance, extend economic life, reduce costs of facility maintenance and operations, or reduce negative environmental impact or social/economic disturbances or disruptions either during the project implementation/Construction phase or the operation phase;
- b. A process for which the Project Proponent or any member of the proponent joint venture/consortium possesses exclusive rights, either world-wide or regionally; or
- c. A design, methodology or engineering concept for which the proponent or a member of the proponent consortium or association possesses intellectual property rights.

SECTION 10.3 - PROJECTS INELIGIBLE FOR UNSOLICITED PROPOSALS

Projects included in the "List of Priority Projects", as defined under Section 2.3, shall not be eligible to be accepted as Unsolicited Proposals, unless involving a new concept or technology. In addition, any component of an approved solicited project shall not be eligible for any Unsolicited Proposal.

SECTION 10.4 - INVESTMENT INCENTIVES AND GOVERNMENT UNDERTAKINGS FOR UNSOLICITED PROPOSALS

As a general rule, the Government may grant Investment Incentives and Government Undertakings to Unsolicited Proposals as enumerated under Rule 13, except for Direct Government Guarantees, direct government subsidy or government equity.

The sale, lease, or grant of usufruct, with consideration of government assets, including among others, right-of-way, to Project Proponents shall not be considered as direct subsidy or equity.

SECTION 10.5 - SUBMISSION OF A COMPLETE PROPOSAL

For an **UNSOLICITED** proposal to be considered by the Agency/LGU, the **UNSOLICITED** proponent has to submit a complete proposal, which shall include a feasibility study, company profile, and the

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draft contract. The Agency/LGU shall acknowledge receipt of the proposal and advise the proponent whether the proposal is complete or incomplete within seven (7) calendar days from submission thereof. If incomplete, it shall indicate what information is lacking or necessary.

SECTION 10.6 - TREATMENT OF MORE THAN ONE PROPOSAL FOR THE SAME OR SIMILAR PROJECT

In the case where the Agency/LGU receives more than one Unsolicited Proposal involving the same or similar project, the Agency/LGU may reject all such proposals and instead, bid out the project as a solicited proposal. Otherwise, the Agency/LGU shall evaluate the proposals using a first in time approach. Under this approach, the first complete proposal is evaluated and decided upon. The second complete proposal will only be entertained if the first one is rejected. Otherwise, the second proposal will be considered only if there is a failure in the negotiation of the first proposal or during the "invitation for comparative proposals" as defined under Section 10.10.

SECTION 10.7 - EVALUATION AND ACCEPTANCE OF UNSOLICITED PROPOSALS

The Agency/LGU is tasked with the initial evaluation of the proposal. The Agency/LGU shall: 1) appraise the merits of the project; 2) qualify the proponent based on the provisions of Rule 5 hereof; 3) assess the appropriateness of the contractual arrangement and reasonableness of the risk allocation; and 4) inform the **ICC** of its receipt of an Unsolicited Proposal. The Agency/LGU is given thirty (30) calendar days to evaluate the proposal from the date of submission of the complete proposal. Within this thirty (30)-day period, the Agency/LGU, shall advise the proponent in writing whether it accepts or rejects the proposal. Acceptance means commitment of the Agency/LGU to pursue the project and recognition of the proponent as "original proponent". At this point, the Agency/LGU will no longer entertain other similar proposals unless the parties are unable to agree during the period for negotiations specified in Section 10.8 below, or until the solicitation of comparative proposals has been completed. **THE AGENCY/LGU SHALL INDICATE IN ITS LETTER OF ACCEPTANCE, THE CONFIRMATION OF THE PROPONENT AS THE "ORIGINAL PROPONENT."**

SECTION 10.8 - ICC DETERMINATION OF REASONABLE RATE OF RETURN PRIOR TO NEGOTIATION

WITHIN SEVEN (7) CALENDAR DAYS UPON ISSUANCE OF THE LETTER OF ACCEPTANCE BY THE AGENCY/LGU, THE HEAD OF AGENCY/LGU SHALL ENDORSE TO THE ICC THE PROPOSED UNSOLICITED PROJECT. PURSUANT TO SECTION 2(O) OF THE ACT, THE ICC SHALL DETERMINE THE REASONABLE RATE OF RETURN ON INVESTMENTS AND OPERATING AND MAINTENANCE COST PRIOR TO NEGOTIATION AND/OR CALL FOR COMPARATIVE PROPOSAL. THE ICC SHALL DETERMINE SUCH RATE WITHIN THIRTY (30) WORKING DAYS UPON RECEIPT OF ENDORSEMENT AND SUBMISSION OF COMPLETE DOCUMENTATION FROM THE HEAD OF AGENCY/LGU, AND FORMALLY ADVISING THE AGENCY/LGU, THEREAFTER, THAT SUCH DETERMINATION IS FINAL AND EXECUTORY. THE ICC SHALL ISSUE THE NECESSARY GUIDELINES IN THE DETERMINATION OF THE REASONABLE RATE OF RETURN.

SECTION 10.9 - NEGOTIATION WITH THE ORIGINAL PROPONENT

WITHIN SEVEN (7) CALENDAR DAYS UPON RECEIPT OF THE AGENCY/LGU OF THE FORMAL ADVISE OF THE ICC, PURSUANT TO SECTION 10.8 ABOVE, the Agency/LGU shall **INFORM, IN WRITING, THE ORIGINAL PROPONENT OF** the mechanics of the negotiation including the commencement date and the authorized representative(s) of the Agency/LGU. Negotiations shall focus on the project scope, implementation arrangements, and the terms and conditions of the draft contract for the Unsolicited Proposal, among others. The Agency/LGU and the original proponent shall conclude negotiations within a period of ninety (90) calendar days from receipt by the proponent of written notice from the Agency/LGU to commence negotiation. The Agency/LGU and the original proponent shall negotiate in good faith and endeavor to complete the negotiation within the ninety (90)-day period; provided, that should there be irreconcilable differences during the negotiation period, the Agency/LGU shall have the option to reject the proposal by advising the original proponent in writing stating the grounds for rejection and thereafter may accept a new Unsolicited Proposal, or bid out the project as a solicited proposal, or undertake the project on its own. **IF NEGOTIATIONS ARE SUCCESSFUL, THE HEAD OF THE AGENCY/LGU AND THE AUTHORIZED SIGNATORY OF THE ORIGINAL PROPONENT SHALL ISSUE A SIGNED**

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CERTIFICATION THAT AN AGREEMENT HAS BEEN REACHED BY BOTH PARTIES. SAID CERTIFICATION SHALL ALSO STATE THAT THE AGENCY/LGU SHALL COMMENCE THE ACTIVITIES FOR THE SOLICITATION OF COMPARATIVE PROPOSALS. The Agency/LGU shall, at the end of the ninety (90)-day negotiation period, submit a report to the ICC of the result of its negotiation with the original proponent.

SECTION 10.10 - TENDER DOCUMENTS

The qualification and tender documents shall be prepared along the lines specified under Rules 4 and 5 hereof. The DRAFT contract as agreed UPON by the AGENCY/LGU AND THE ORIGINAL PROPONENT AND AS APPROVED BY THE HEAD OF AGENCY/LGU, which shall be part of the tender documents, will be considered final and non-negotiable by the comparative proponents. Proprietary information shall, however, be respected, protected and treated with utmost confidentiality. As such, it shall not form part of the bidding/tender and related documents.

SECTION 10.11 - INVITATION FOR COMPARATIVE PROPOSALS

WITHIN SEVEN (7) CALENDAR DAYS UPON ISSUANCE OF THE CERTIFICATION OF A SUCCESSFUL NEGOTIATION REFERRED TO IN SECTION 10.9,The Agency/LGU PBAC shall publish the invitation for comparative proposals . The invitation for comparative or competitive proposals should be published at least once every week for three (3) consecutive weeks in at least one (1) newspaper of general circulation. Said invitation should also be posted continuously in the website of the Agency/LGU concerned, if available, during the period stated above. For projects costing at least US\$ 10 million, the invitation may also be published at least once (1) in at least one (1) international publication. It shall indicate the time, which should not be earlier than the last date of publication, and place where tender/bidding documents could be obtained. It shall likewise explicitly specify a time of sixty (60) working days reckoned from the date of issuance of the tender/bidding documents upon which proposals shall be received. Beyond said deadline, no proposals shall be accepted. A pre-bid conference shall be conducted ten (10) working days after the issuance of the tender/bidding documents.

SECTION 10.12 - POSTING OF BID BOND BY ORIGINAL PROPONENT

The original proponent shall be required at the date of the first day of the publication of the "invitation for comparative proposals" to submit a bid bond equal to the amount and in the form required of the comparative proponents.

SECTION 10.13 - QUALIFICATION OF COMPARATIVE PROPONENTS

The evaluation criteria used for qualifying the original proponent should be the same criteria used in the "Term of Reference" for the comparative proponents.

SECTION 10.14 - SUBMISSION OF PROPOSAL

The bidders are required to submit the proposal in three envelopes at the time and place specified in the Tender Documents. The first envelope shall contain the qualification documents, the second envelope the technical proposal as required under Section 7.1 (b), and the third envelope the financial proposal as required under Section 7.1 (c).

SECTION 10.15 - EVALUATION OF COMPARATIVE PROPOSALS

Proposals shall be evaluated in three stages: Stage 1, qualification documents; Stage 2, the technical proposal; and Stage 3, the financial proposal. Only those bids which pass the first stage will be considered for the second stage and similarly, only those which pass the second stage will be considered for the third stage evaluation. The Agency/LGU will return to the disqualified bidders the remaining envelopes unopened, together with a letter explaining why they were disqualified. The criteria for evaluation will follow Rule 5 for the qualification of bidders and Rule 8 for the technical and financial proposals. The time frames under Rules 5 and 8 shall likewise be followed.

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SECTION 10.16 - DISCLOSURE OF THE PRICE PROPOSAL

The decision to disclose the price or financial proposal of the original proponent in the Tender Documents shall be mutually agreed upon between the Agency/LGU and the original proponent. If the original proponent's price proposal was not disclosed in the Tender Documents, it should be revealed upon the opening of the financial proposals of the comparative proponents.

SECTION 10.17 - FAILURE OF A WINNING COMPARATIVE PROPONENT TO ENTER INTO CONTRACT

In the event of refusal, inability or failure of the winning comparative proponent to enter into contract with the Agency/LGU within the specified time in the Tender Documents, its bid security shall be forfeited in favor of the Agency/LGU. In such an event, the Agency/LGU concerned shall consider for award the bidder with the next-ranked complying comparative bid which is better than the offer of the original proponent. The original proponent shall again be given the right to match the comparative proponent's bid. If no other comparative bid is determined to be better than the offer of the original proponent, the project shall immediately be awarded to the original proponent.

RULE 11 - AWARD AND SIGNING OF CONTRACT

SECTION 11.1 - RECOMMENDATION TO AWARD

Within seven (7) calendar days from the date the financial evaluation shall have been completed, the Agency/LGU PBAC will submit to the Head of Agency/LGU a recommendation of award. The PBAC will prepare and submit a detailed evaluation/assessment report on its decision regarding the evaluation of the bids and explain in clear terms the basis of its recommendations.

SECTION 11.2 - DECISION TO AWARD

Within seven (7) calendar days from the submission by PBAC of the recommendation to award, the Head of Agency/LGU shall decide on the award. The approval shall be manifested by signing and issuing the "Notice of Award" to the winning Project Proponent within seven (7) calendar days from approval thereof.

All unsuccessful bidders shall be informed in writing of the decision of the Agency/LGU to award the project to the winning Project Proponent. Such decision shall be made available to the public when requested.

SECTION 11.3 - NOTICE OF AWARD

The "Notice of Award", which is issued by the Head of Agency/LGU, shall indicate, among others, that the winning Project Proponent must submit within thirty (30) calendar days from official receipt of the "Notice of Award" the following:

- a. prescribed performance security;
- b. proof of commitment of the required equity contribution, as specified by the Agency/LGU:
 - i. in the case where the Project Proponent is a corporation - e.g., treasurer's affidavit attesting to actual paid-up capital, subscription agreement(s) between a shareholder(s) of the Project Proponent and the Project Proponent itself covering said equity contribution, or shareholders agreement between and amongst 2 or more shareholders of the Project Proponent undertaking to contribute/subscribe the required equity contribution; or
 - ii. in the case of a joint venture/consortium - an undertaking of the members thereof to infuse the required equity contribution to the joint venture/consortium.

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- c. proof of firm commitments from reputable financial institution to provide sufficient credit lines to cover the total estimated cost of the project;
- d. in the case of a joint venture/consortium, the agreement indicating that the members are jointly and severally liable for the obligations of the Project Proponent under the contract; or
- e. in case **A SPECIAL PURPOSE COMPANY** (SPC) is formed for purposes of undertaking the project, proof of registration in accordance with Philippine laws.
- f. such other conditions imposed by the Agency/LGU.

Failure to submit the requirements within the prescribed thirty (30)-calendar day period will result in confiscation of the bid security. Within seven (7)-calendar days upon receipt of the foregoing requirements for award, the Head of Agency/LGU shall determine and notify the winning bidder of its compliance of all the conditions stated in the said notice.

SECTION 11.4 - FORMATION OF SPECIAL PURPOSE COMPANY (SPC)

The winning Project Proponent may cause the incorporation of a **an** SPC that shall assume and accede to all the rights and obligations of the winning Project Proponent, Provided, that:

- a. the SPC is registered in accordance with applicable Philippine corporate/commercial/investment laws;
- b. the winning Project Proponent subscribes to and pays for a significant/principal shareholding or controlling interest in the SPC, subject to the nationality and ownership requirements under the Constitution and other applicable laws. The required level of share ownership may be indicated in the tender documents or determined as a condition prior to contract award;
- c. in the case of a joint venture/consortium, all members thereof shall present proof of contractual or other legally binding ties to or relationships with the SPC for the development and implementation of the project in accordance with their submitted business plan, e.g., for facility owners/developers/equity investors - subscription to and payment for a significant number of shares in the SPC; for Contractors or operators - binding appointment and undertaking to be the Contractor/operator or duly signed engineering, procurement and Construction (EPC) contract/operation and maintenance agreement; for financial institutions - letter of firm commitment to raise or provide financing to the project;
- d. an accession undertaking is executed by the SPC and the winning proponent in favor of the Agency/LGU making the SPC principally liable for the performance of the winning Project Proponent's obligations under the Notice of Award and/or the contract;
- e. a written notice to form the SPC and the proposed accession are submitted to the Agency/LGU within five (5) calendar days from date of receipt of Notice of Award.

SECTION 11.5 - WITHDRAWAL/SUBSTITUTION OF A MEMBER

Subject to the approval of the Agency/LGU, any member of the joint venture or consortium, or a shareholder of the SPC created (who was a member of such joint venture or consortium), or its pre-qualified Contractors may withdraw as such prior to award of the project or any time during the contract term, provided that, the remaining members or shareholders with or without the substitute are still legally, technically, and financially capable of successfully carrying out the implementation/operation of the project or that a suitable and acceptable substitute with equal or better qualifications is replacing such withdrawing member or shareholder subject to the provision in Section 11.3 (d).

A withdrawal made in violation of this section shall be a ground for disqualification or cancellation of the contract, as the case may be, and forfeiture of the proponent's bid or performance security.

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SECTION 11.6 - VALIDITY OF BIDS/RETURN OF BID SECURITY

The execution of the contract shall be made within the period of the validity of the bid security. The required bid security shall be valid for a reasonable period but in no case beyond one hundred eighty (180) calendar days following the opening of the bids. Bid securities shall be returned to the unsuccessful bidders as soon as the contract is signed by the winning bidder.

SECTION 11.7 - EXTENSION OF VALIDITY OF BIDS

When an extension of validity of bids is considered necessary, those who submitted bids shall be requested in writing to extend the validity of their bids before the expiration date. However, bidders shall not be allowed to modify or revise the price or other substance of their bids.

Bidders shall have the right to refuse to grant such an extension without forfeiting their bid security, but those who are willing to extend the validity of their bids should be required to provide a suitable extension of bid security.

SECTION 11.8 - FAILURE OF BIDDING

In the case of solicited bids, when no complying bids are received or in case of failure to execute the contract with a qualified and contracting bidder due to the refusal of the latter, the bidding shall be declared a failure. In such cases, the project shall be subjected to a re-bidding.

RULE 12 - CONTRACT APPROVAL AND IMPLEMENTATION

SECTION 12.1 - EXECUTION/APPROVAL OF THE CONTRACT

The authorized signatory(ies) of the winning bidder and the **HEAD OF** Agency/LGU shall execute and sign the contract for the project, within seven (7) calendar days from receipt by the winning bidder of the notice from the Agency/LGU that all conditions stated in the Notice of Award have been complied with. Consistent with Article 1159 of the New Civil Code, the contract is the law between the parties and the parties shall perform their respective prestations, obligations, and undertakings thereunder with utmost good faith with the end in view of attaining the objective hereof. An original signed copy of the contract shall be submitted to the **NEDA BOARD THROUGH THE ICC** within seven (7) calendar days after signing thereof **BY THE AGENCY/LGU FOR INFORMATION.**

In the event of refusal, inability or failure of the winning bidder to enter into contract with the Government within the time provided therefor, the Agency/LGU concerned shall forfeit its bid security. In such an event, the Agency/LGU concerned shall consider the bidder with the next ranked complying bid. If the same shall likewise refuse or fail to enter into contract with the Government, its bid security shall likewise be forfeited and the Agency/LGU concerned shall consider the next ranked complying bid, and so on until a contract shall have been entered into. In the event that the concerned Agency/LGU is unable to execute the contract with any of the complying bidders, a failure of bidding will be declared and the project may be subjected to a re-bidding.

SECTION 12.2 - OTHER APPROVALS FOR CONTRACT

The Project Proponent shall, as may be required under the existing laws, rules and regulations secure any and all other approvals for the contract or the implementation thereof from government agencies or bodies including the Regulator in the case of Public Utility Projects. This includes securing the necessary and appropriate environmental clearances from the DENR prior to actual project Construction. The DENR shall act on the environmental clearance of the project within the time frame prescribed and following the guidelines of DENR Administrative Order No. 96-37 and subsequent guidelines as may be issued from time to time. The Agency/LGU may provide the necessary assistance to the Project Proponent in securing all the required clearances. The contract

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shall provide milestones in securing such other approvals required for the implementation of the contract.

SECTION 12.3 - GRANT OF FRANCHISE

Subject to the provisions of the Constitution and other existing laws, once a contract involving Public Utility Projects is executed by the Project Proponent and the Agency/LGU, a presumption arises that the public interest will be served by the implementation of the project covered thereby, and immediately upon application by the Project Proponent, the Regulator shall grant in favor of the Project Proponent a Franchise on a provisional basis to operate the facility and collect the tolls, fees, rentals, and other charges stipulated under the contract, and after hearing and determination that all other requirements are complied with, make such Franchise permanent and for a fixed term.

SECTION 12.4 - CONTRACT EFFECTIVITY

The contract shall be effective upon signing thereof by the Head of Agency/LGU and unless another date is stipulated therein.

SECTION 12.5 - NOTICE TO COMMENCE

The concerned Agency/LGU shall issue the "Notice to Commence Implementation" of the project to the proponent not later than seven (7) calendar days from the date of the approval/signing of the contract by the Head of Agency/LGU.

SECTION 12.6 - PREPARATION AND APPROVAL OF DETAILED ENGINEERING DESIGN

The Project Proponent shall be responsible for the preparation of the detailed engineering designs and plans based on the prescribed minimum design and performance standards and specifications and shall submit the same to the Agency/LGU concerned.

The Agency/LGU concerned shall review the detailed engineering designs and plans prepared by the Project Proponent in terms of its compliance with the prescribed standards and specifications, and if found acceptable, shall approve the same for incorporation in the contract to be signed by the Project Proponent and the Agency/LGU. This approval by the Agency/LGU concerned notwithstanding, the Project Proponent shall be solely responsible for the integrity of its detailed engineering designs and plans. The approval thereof by the Agency/LGU concerned does not diminish this responsibility, nor does it transfer any part of such responsibility to the Agency/LGU concerned.

In the case of local projects, the LGU concerned shall ensure that the technical designs, plans, specifications, and related aspects necessary for the project's Construction, operation and maintenance shall be based on relevant local and national policies, standards and guidelines. Moreover, the LGU shall consult with appropriate national regulatory bodies regarding national policies, standards, and guidelines in granting the necessary Franchise.

SECTION 12.7 - PROJECT CONSTRUCTION

The Project Proponent shall build the facility in accordance with the design and performance standards and specifications prescribed in the approved detailed engineering design. For this Construction stage, the Project Proponent may engage the services of foreign and/or Filipino Contractors that comply with the requirements as prescribed under Section 5.4 (a) and (b). In the case of foreign Contractors, Filipino labor shall be employed in the different phases of the Construction works where Filipino skills are available. Hiring of labor shall be subject to existing labor laws, rules and regulations.

SECTION 12.8 - PERFORMANCE GUARANTEE FOR CONSTRUCTION WORKS

To guarantee the faithful performance by the Project Proponent of its obligations under the contract, including the prosecution of the Construction works related to the project, the Project Proponent shall post a performance guarantee in favor of the Agency/LGU concerned, within the period and in

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the form and amount stipulated in the Notice of Award. The performance security may be in the form of cash, bank draft or guarantee confirmed by a local bank (in the case of foreign bidders bonded by a foreign bank), letter of credit issued by a reputable bank, surety bond callable on demand issued by the GSIS or by surety or insurance companies duly accredited by the Office of the Insurance Commissioner, or a combination thereof, in accordance with the following schedules:

- a. Cash, irrevocable letter of credit, bank draft - a minimum of two percent (2%) of the total Project Cost.
- b. Bank Guarantee - a minimum of five percent (5%) of the total Project Cost.
- c. Surety Bond - a minimum of ten percent (10%) of the total Project Cost.

The performance guarantee shall be valid up to acceptance by the Agency/LGU of the facility.

SECTION 12.9 - PERFORMANCE GUARANTEE FOR OPERATION

For projects where the proponent or other third parties shall operate the project, the Agency/LGU shall determine whether the Project Proponent will post an operating security, simultaneously with the acceptance of the facility and the release of the performance security. The operating security will be issued to guarantee the proper operation of the project in accordance with the operating parameters and specifications under the contract. The Agency/LGU shall determine the amount but the form shall be in accordance with the preceding section. This operating security shall be valid ninety (90) calendar days after the turn-over of the facility, as contemplated in Section 12.22, or as may be provided in the contract whichever is longer.

SECTION 12.10 - REVIEW OF PROJECT CONSTRUCTION, OPERATION AND MAINTENANCE

The Agency/LGU may inspect and check, from time to time, the project to determine whether the project is constructed, operated and maintained in accordance with the approved plans, specifications, standards and costs under the contract.

In the event that the Agency/LGU concerned shall find any deviation from or non-compliance with the approved plans, specifications and standards, it shall bring the same to the attention of the Project Proponent for the necessary corrective actions. Failure of the Project Proponent to correct the deviation within the time prescribed by the Agency/LGU may be a ground for the rescission/termination of the contract, in accordance with Section 12.20 (b) of these Revised IRR. Such technical supervision by the Agency/LGU concerned shall not diminish the singular responsibility of the Project Proponent for the proper Construction, operation, and maintenance of the facility, nor does it transfer any part of that responsibility to the Agency/LGU.

SECTION 12.11 - CONTRACT VARIATION

Subject to the approval by the HEAD OF Agency/LGU, a contract variation may be allowed, Provided, that:

- a. Except as may be allowed under a parametric formula in the contract itself, there is no increase in the agreed fees, tolls and charges or a decrease in the Agency/LGU's revenue or profit share derived from the project; or
- b. There is no reduction in the scope of works or performance standards, or fundamental change in the contractual arrangement nor extension in the contract term, except in cases of breach on the part of the Agency/LGU of its obligations under the contract; or
- c. **THERE IS No** additional Government Undertaking, or increase in the financial exposure of the Government under the project; or
- d. Such is necessary due to an unforeseeable event beyond the control of the parties.

Under no circumstances shall a Project Proponent proceed to commence a proposed contract

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variation unless approved by the HEAD OF AGENCY/LGU. Failure to secure approval of the HEAD OF AGENCY/LGU CONCERNED shall render the contract variation void.

SECTION 12.12 - MILESTONES

The Project Proponent shall execute the project in accordance with pre-determined milestones. Failure by the Project Proponent to comply with these milestones may result to contract rescission and forfeiture of the performance security of the proponent, in accordance with Section 12.20 (b) hereof.

SECTION 12.13 - RELEASE OF PERFORMANCE GUARANTEE/OPERATING SECURITY

a. Performance Guarantee

The performance guarantee shall be released by the Agency/LGU concerned after the issuance of the "Certificate of Completion and Acceptance" of the Construction works, and the acceptance by the Agency/LGU of the project as completed in accordance with the agreed standards and specifications, provided that there are no claims filed against the Project Proponent or its Contractor

As may be agreed upon in the contract, a portion of the performance security shall be released upon compliance with corresponding milestones.

b. Operating Security

The operating security shall be released by the Agency/LGU concerned on the transfer date of the facility, provided that there are no claims filed against the Project Proponent and its Contractor.

SECTION 12.14 - LIQUIDATED DAMAGES

Where the Project Proponent fails to satisfactorily complete the work on or before completion date, including any extension or grace period duly granted, or meet the operating performance standard as prescribed in the contract, the Project Proponent shall pay the Agency/LGU concerned liquidated damages, as specified in the contract as an indemnity and not by way of penalty. The performance security or operating security, as the case may be, shall answer for any liquidated damages due to the Agency/LGU.

During the Construction period, the amount of liquidated damages due for every calendar day of delay beyond the completion date will be determined by the Agency/LGU. During the operation period, the amount of liquidated damages, which will be determined by the Agency/LGU, shall be based on the principle of fair compensation for damages which the Agency/LGU will sustain as a result of the Project Proponent's failure to meet its obligations.

The imposition and collection of liquidated damages shall be without prejudice to the right of the Agency/LGU concerned to rescind the contract and proceed with the procedures prescribed under Section 12.20 (b).

SECTION 12.15 - REPAIR AND MAINTENANCE COSTS

The Project Proponent shall, within the contract term and the warranty period prescribed under Section 12.22, undertake the necessary and appropriate repair and maintenance of the project, in accordance with the design and performance standards prescribed in the approved contract, in order to ensure that the facility operates at the desired level of service. For this purpose, and where applicable, a portion of the project's revenues equivalent to the cost of the project's repair and maintenance, as indicated in the Project Proponent's bid proposal shall be set aside and reserved exclusively for repair and maintenance costs of the project. For facility, an escrow account may be established for the purpose.

SECTION 12.16 - REPAYMENT SCHEMES

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12.16.1 General Classification

The repayment schemes for the projects shall depend on the contractual arrangement as follows:

- a. For projects undertaken through BOT, CAO, DOT, ROT, BOO and ROO arrangements, the Project Proponents may be repaid by authorizing it to collect reasonable tolls, fees, and charges for a fixed term. In the case of BOT, CAO, DOT, ROT arrangements, such term shall in no case exceed fifty (50) years. However, for BOO and ROO arrangements, the Project Proponent, upon renewal of its Franchise or contract with the Agency or LGU, may be allowed to continue collecting toll, fees, charges and rentals for the operation of the facility or the provision of the service.
- b. For projects undertaken through BTO arrangement - the Project Proponent may be repaid by either of the following two options: First Option - the Agency/LGU provides Amortization as may be appropriate and reasonable. Toll, fees, rentals and charges that the Project Proponent may collect while operating the facility on behalf of the Agency/LGU may be applied directly to the Amortization. Moreover, the Facility operator may be repaid by the Agency/LGU through a management fee as may be incorporated in the management contract entered between the Agency/LGU and the Project Proponent; Second Option - the Project Proponent may be allowed to directly collect tolls, fees, rentals and charges for a fixed term.
- c. For projects undertaken through BT and BLT arrangements - the Project Proponent may be repaid by the Agency/LGU through Amortization as may be appropriate and reasonable.
- d. Where applicable, the proponent may likewise be repaid in the form of a share in the revenue of the project or other non-monetary payments, such as, but not limited to the grant of commercial development rights or the grant of a portion or percentage of the reclaimed land, subject to constitutional requirements.
- e. For projects undertaken through arrangements not enumerated under this Act but approved/authorized by the NEDA Board, the Project Proponent may be repaid through any schemes as recommended by the ICC and approved/authorized by the NEDA Board.

12.16.2 Tolls, fees, rentals and charges

The proposed tolls, fees, and charges shall be considered by the Agency/LGU in the evaluation of the bid, taking into account the reasonableness thereof to the end-users of the facility. The tolls, fees, charges and rentals that a Project Proponent may charge for the use of the facility shall be those as approved by the Approving Body consistent with Section 1.3 (a.a), resulting from the bidding, and incorporated in the contract, which, shall be upheld/adopted/accorded utmost weight/recognized by the Regulator.

12.16.3 Remittance of Earnings or Other Amounts Due to a Foreign Project Proponent

The remittance of earnings and other amounts due to a foreign proponent under the contract shall be in accordance with pertinent laws, rules and regulations especially those issued by the BSP.

SECTION 12.17 - REVENUE SHARING

The Agency/LGU concerned may share in the revenue from the operation of the Project Proponent in the form of either a fixed fee or a certain percentage of the gross revenue or a combination of both, provided that the same is indicated in the bidding documents and included in the contract.

SECTION 12.18 - ADJUSTMENTS OF TOLLS/FEES/RENTALS/CHARGES

The tolls, fees, rentals and charges may be subject to adjustment during the life of the contract,

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based on the pre-determined formula and official price indices prescribed in the "Instructions to Bidders" and the approved contract. For this purpose, prior to bidding, the concerned Agency/LGU shall secure the advice of the Regulator for such formula. The monitoring of the consistency of the proposed adjustments of tolls, fees, rentals and charges with the prescribed rate of return, if any, shall be undertaken by the appropriate regulatory body or Implementing Agency/LGU.

Price indices shall be based on the official issuances by the National Statistics Office (NSO), BSP, Department of Labor and Employment (DOLE) and other sources authorized by the Agency/LGU concerned prior to bidding.

SECTION 12.19 - AUDIT OF COLLECTIONS

All revenues, share and/or receipts pertaining to or accruing to the Agency/LGU derived from any project proposed under the Act and these Revised IRR, including expenditures or use of funds and property, owned or held in trust by, or pertaining to the Government, shall be subject to examination audit by the Commission on Audit (COA), including i) ensuring that such revenues, share and/or receipts are fully and properly accounted for and remitted to the Agency/LGU, and ii) determining if the mandated return on rate base is complied with, in the case of Public Utility Projects.

All revenues and receipts pertaining to or accruing to the Project Proponent shall be treated as private funds including interest or yield thereon, which may be remitted directly to the Project Proponent, as may be stipulated in the contract.

SECTION 12.20 - CONTRACT TERMINATION/RESCISSION

The contract may be terminated/rescinded in the following events:

- a. If the Agency/LGU concerned fails to comply with any major obligation prescribed in the approved contract, and such failure is not remediable or if remediable shall remain unremedied for an unreasonable length of time, the Project Proponent may, with prior notice to the concerned Agency/LGU, specifying the turn-over date, terminate the contract. In such an event, the Project Proponent shall be reasonably compensated by the Government for equivalent or proportionate contract cost, as defined in the contract subject to (c) below.
- b. If the Project Proponent refuses or fails to perform any of the provisions of the approved contract with such diligence as will ensure the project's completion, operation and maintenance in accordance with the prescribed technical and performance standards or otherwise fails to satisfy any of the contract provisions including compliance with the prescribed/agreed milestone activities, or commits any substantial breach of the approved contract, the Agency/LGU shall notify the Project Proponent in writing of the same and if not corrected within the time specified, the Agency/LGU concerned may rescind the contract. In such an event, the Agency/LGU concerned may either:
 - i. Take over the facility and assume all attendant liabilities thereof; or
 - ii. Allow the Project Proponent's lenders/creditors/banks to exercise their rights and interests under the loan and collateral documents with respect to the project.

In any case, the Agency/LGU concerned shall likewise forfeit the performance security of the defaulting Project Proponent.

- c. In the event that the project/contract is: (a) revoked, cancelled, or terminated by (i) the Agency/LGU in accordance with the contract through no fault of the Project Proponent or (ii) by mutual agreement, or (b) revoked or canceled by a court by final judgment through no fault of the Project Proponent, the Agency/LGU shall compensate the said Project Proponent for its actual expenses incurred in the project plus a Reasonable Rate of Return thereon not exceeding that stated in the contract, as of the date of contract termination, provided that the interest of the Government in these instances shall be duly insured with the GSIS or any other insurance entity duly accredited by the Office of the Insurance Commissioner, provided further that the cost of the insurance coverage shall be included in the terms and

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conditions of the approved contract.

In the cases referred to in (a) and (c) above, an independent appraiser, mutually acceptable to the Agency/LGU and the Project Proponent, shall determine the amount to be paid to the Project Proponent, which determination shall be made within a period not more than one hundred eighty (180) calendar days from contract rescission or termination. The amount determined by the independent appraiser shall be binding to both the Project Proponent and the Agency/LGU.

In cases of emergency or when the public interest so requires, the Agency/LGU may immediately take-over the facility prior to the determination of said amount and payment thereof to the Project Proponent. Unless otherwise agreed upon by the Agency/LGU and the Project Proponent, the amount fixed by said independent appraiser shall be paid by the Agency/LGU not later than ninety (90) calendar days from said independent appraiser's advice of such determination, subject to the enactment of a law or ordinance, as the case may be, appropriating such amount, if required.

SECTION 12.21 - VENUE FOR LITIGATION

The venue for the resolution of disputes, arbitration or litigation shall be as mutually agreed upon by the parties to the contract. In default thereof, the venue shall be in the Philippines.

SECTION 12.22 - TRANSFER OF AND WARRANTY OVER THE FACILITY

Under Contractual Arrangements involving transfer of the facility to the Agency/LGU, the transfer or turnover will necessarily include the transfer of full legal ownership over the project in favor of the Agency/LGU, subject to any existing liens as may be agreed upon in the project agreement. The Project Proponent shall provide warranty that the facility meets the project technical specifications/agreed system features, performance standards and services in connection therewith for a period not less than one (1) year from the turnover of the facility. For this purpose, the Project Proponent shall put up a warranty security in the form of cash, letter of credit, or bank draft/guarantee issued by a reputable local/foreign bank, or a surety bond issued by the GSIS or an entity duly registered and recognized by the Office of the Insurance Commissioner, callable on demand and acceptable to the Agency/LGU, or any combination thereof payable to the Agency/LGU concerned, the amount of which shall be determined by the Agency/LGU and shall be stipulated in the contract. The warranty security shall be made effective immediately upon transfer of full legal ownership over the project in favor of the Agency/LGU, as described above.

RULE 13 - INVESTMENT INCENTIVES AND GOVERNMENT UNDERTAKINGS

SECTION 13.1 - SOURCES OF FINANCING

In the Construction of projects authorized under the Act and these Revised IRR, the Project Proponent may obtain the required financing for the Construction of the project from foreign and/or domestic sources.

SECTION 13.2 - INVESTMENT INCENTIVES

The following Investment Incentives will be made available to Project Proponents:

- a. Projects undertaken through Contractual Arrangements authorized under these Revised IRR costing more than PhP 1.0 billion shall, upon registration with the Board of Investments (BOI), be entitled to incentives as provided for under the Omnibus Investment Code.
- b. Projects undertaken through Contractual Arrangements authorized under these Revised IRR costing PhP 1.0 billion or less may, upon registration with BOI, avail of incentives provided for under the Omnibus Investment Code subject to inclusion of the project activity or sector in the current Investment Priorities Plan (IPP) of BOI.
- c. Projects undertaken through Contractual Arrangements authorized under these Revised IRR shall also be entitled to other incentives, as provided under existing laws, such as, but not

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limited to incentives under P.D. 535 (1974), otherwise known as the "Tourism Incentives Program of 1974," and R.A. 7156, otherwise known as the "Mini-Hydroelectric Power Incentives Act".

- d. LGUs may provide additional tax incentives, exemptions, or reliefs, subject to the provisions of the Local Government Code (LGC) of 1991 and other pertinent laws.

SECTION 13.3 - GOVERNMENT UNDERTAKINGS

Subject to existing laws, policies, rules and regulations, the Government may provide any form of direct or indirect support or contribution, such as, but not limited, to the following, subject to the conditions for Unsolicited Proposals as specified under Section 10.1 hereof:

- a. **Cost Sharing** - This shall refer to the Agency/LGU concerned bearing a portion of capital expenses associated with the establishment of an infrastructure development facility, such as, the provision of access infrastructure, right-of-way, transfer of ownership over, or usufruct, or possession of land, building or any other real or personal property for direct use in the project and/or any partial financing of the project, or components thereof, Provided, that such shall not exceed fifty percent (50%) of the Project Cost, and the balance to be provided by the Project Proponent. Such government share may be financed from direct government appropriations and/or from Official Development Assistance (ODA) of foreign government or institutions.
- b. **Credit Enhancements** - This shall refer to direct and indirect support to a development facility by the Project Proponent and/or Agency/LGU concerned, the provision of which is contingent upon the occurrence of certain events and/or risks, as stipulated in the contract. Credit enhancements are allocated to the party that is best able to manage and assume the consequences of the risk involved. Credit enhancements may include, but are not limited to, government guarantees on the performance, or the obligation of the Agency/LGU under its contract with the Project Proponent, subject to existing laws on indirect guarantees. Indirect Guarantees shall refer to an agreement whereby the Government or any of its Agencies/LGUs assumes full or partial responsibility for or assists in maintaining the financial standing of the Project Proponent or project company in order that the Project Proponent/company avoids defaulting on the Project Loans, subject to fulfillment of the Project Proponent/company of its undertakings and obligations under the project agreement.
- c. **Direct Government Subsidy** - This shall refer to an agreement whereby the Government, or any of its Agencies/LGUs will: (a) defray, pay for or shoulder a portion of the Project Cost or the expenses and costs in operating or maintaining the project; (b) condone or postpone any payments due from the Project Proponent; (c) contribute any property or assets to the project; (d) in the case of LGUs, waive or grant special rates on real property taxes on the project during the term of the contractual arrangement; and/or (e) waive charges or fees relative to business permits or licenses that are to be obtained for the Construction of the project, all without receiving payment or value from the Project Proponent and/or Facility operator for such payment, contribution or support.
- d. **Direct Government Equity** - This shall refer to the subscription by the Government or any of its agencies or Local Government Units of shares of stock or other securities convertible to shares of stock of the project company, whether such subscription will be paid by the money or assets.
- e. **Performance Undertaking** - This shall refer to an undertaking of a department, bureau, office, commission, authority, agency, GOCC, or LGU in assuming responsibility for the performance of the Agency's/LGU's obligations under the contractual arrangement including the payment of monetary obligations, in case of default. These undertakings may be subject to payment of risk premium to the Government or LGU, or any other authorized agency.
- f. **Legal Assistance** - This shall refer to the extension of representation by government lawyers to a Project Proponent but only in cases, hearings, or inquiries where the Agency/LGU and Project Proponent are party-defendants/respondents therein including the adoption by such

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government lawyers of positions and strategies consistent with upholding the validity of the approved contractual arrangement.

- g. Security Assistance - This shall refer to the deployment of government security forces, either from the Philippine National Police (PNP) or the Armed Forces of the Philippines (AFP) in the vicinity of the project site to provide security during the implementation of the project up to completion.

The Agency/LGU may offer any one or more Government Undertakings relative to a project, which shall be pre-cleared in principle, in writing, by the department, bureau, office, commission, authority, agency, GOCC, or LGU **OR ANY OTHER GOVERNMENT ENTITY** that will grant the same **AS MANDATED BY LAW**.

RULE 14 - COORDINATION AND MONITORING OF PROJECTS

SECTION 14.1 - TIMELINES

All timelines shall be contained in a flow chart herein attached as Annex A..

SECTION 14.2 - BOT UNITS

Each concerned Agency/LGU may create a BOT Unit headed by a senior official of the Agency/LGU and shall designate a senior official as BOT Project Development Officer (PDO), who shall be responsible for planning, overseeing, and monitoring projects of Agencies/LGUs authorized under the Act and these Revised IRR.. **THE BOT UNIT SHALL ALSO INCLUDE AS MEMBERS, AMONG OTHERS, TECHNICAL AND LEGAL PERSONNEL WHO ARE KNOWLEDGEABLE ON THE TECHNICAL AND LEGAL ASPECTS, RESPECTIVELY, OF THE BOT PROJECTS THAT MAY BE IMPLEMENTED PURSUANT TO THE ACT AND THESE REVISED IRR.**

SECTION 14.3 - INFORMING CONGRESS

A report regarding the salient features or a copy of each contract, involving a project entered into under the provisions of these Revised IRR, shall be **PREPARED AND** submitted **BY THE AGENCY/LGU** to Congress, **COPY THE ICC**, for its information.

RULE 15 - FINAL PROVISIONS

SECTION 15.1 - IRR COMMITTEE

The Committee constituted pursuant to Section 11 of R.A. 6957, as amended by R.A. 7718, may be reconvened by its Chairman at his instance, or upon the recommendation of any members of the Committee, formulate and prescribe amendments to these Revised IRR, consistent with the letter and spirit of the Act. No amendments to these Revised IRR may be adopted and prescribed by the Committee without due public consultation/hearing and publication.

SECTION 15.2 - EFFECTIVITY OF THESE REVISED IRR OR AMENDMENTS THERETO

Amendments to these Revised IRR or amendments thereto shall, **AFTER DUE PUBLIC HEARING**, become effective fifteen (15) days after its complete publication in at least one (1) newspaper of general circulation.

SECTION 15.3 - TRANSITORY PROVISION

ALL BOT PROJECTS, INCLUDING THOSE PRESENTLY BEING PROCESSED AND/OR REVIEWED BUT NOT YET IMPLEMENTED, IN ACCORDANCE WITH THE ACT AND PREVIOUS VERSIONS OF THESE IRR, SHALL HEREAFTER BE PROCESSED AND/OR REVIEWED IN ACCORDANCE WITH THESE REVISED IRR.

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PROJECTS UNDER IMPLEMENTATION SHALL BE GOVERNED BY THE CONTRACT PROVISIONS ENTERED INTO BY THE CONCERNED PARTIES.

SECTION 15.4 - SEPARABILITY CLAUSE

In the event any of the provisions of these Revised IRR is declared void or unenforceable by final judgment of a court of competent jurisdiction, the other provisions unaffected thereby shall remain in full force and effect.